Petition

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No.

ADVANCE ROSS ELECTRONICS CORPORATION and ADVANCE ROSS CORPORATION,

Petitioners,

v.

ROY WESLEY GREEN, JR., TRUSTEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TWELFTH SUPREME JUDICIAL DISTRICT, TYLER, TEXAS

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QUESTIONS PRESENTED

1. Whether it was a violation of full faith and credit for the Texas courts to overrule a plea to abate a Texas lawsuit filed by respondent five days after he had filed a lawsuit in Illinois presenting the same issue.

2. Whether it was a denial of due process for the Texas Courts to overrule petitioners' plea in abatement and allow the Texas courts to proceed to judgment on the same issue raised by respondent in his earlier Illinois lawsuit.

3. Whether it was a denial of due process for the Texas appellate courts not to consider the merits of the arguments raised by petitioners in support of their plea to abate this action.

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United States v. *California & Oregon Land Co.*, 192 U.S. 355 (1904)

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ROY WESLEY GREEN, JR., TRUSTEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TWELFTH SUPREME JUDICIAL DISTRICT, TYLER, TEXAS

The petitioners Advance Ross Electronics Corporation and Advance Ross Corporation respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Twelfth Supreme Judicial District, Tyler, Texas, entered on October 29, 1981.

OPINIONS BELOW

The opinions of the Court of Appeals for the Twelfth Judicial District, Tyler, Texas, and of the 188th Judicial District Court

of Gregg County, Texas, appear in the Appendix hereto. No opinion was rendered by the Supreme Court of Texas because it denied the application for a writ of error.

JURISDICTION

The judgment of the Civil Appeals for the Twelfth Judicial District, Tyler, Texas, was rendered on October 29, 1981. A timely petition for rehearing was denied on November 19, 1981. A timely application for writ of error to the Texas Supreme Court was denied on February 24, 1982, and this petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257.

QUESTIONS PRESENTED

1. Whether it was a violation of full faith and credit for the Texas courts to overrule a plea to abate a Texas lawsuit filed by respondent five days after he had filed a lawsuit in Illinois presenting the same issue.

2. Whether it was a denial of due process for the Texas Courts to overrule petitioners' plea in abatement and allow the Texas courts to proceed to judgment on the same issue raised by respondent in his earlier Illinois lawsuit.

3. Whether it was a denial of due process for the Texas appellate courts not to consider the merits of the arguments raised by petitioners in support of their plea to abate this action.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article IV, Section 1:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

United States Constitution Amendment XIV (pertinent part):

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Roy Wesley Green, Jr. ("Green") filed cause number 79-CH-591 in the Circuit Court of Cook County, Illinois, County Department, Chancery Division ("Illinois Action") on February 15, 1979. The Illinois Action seeks damages and injunctive relief from Advance Ross Electronics Corporation, (an Illinois corporation), Advance Ross Corporation (a Delaware corporation based in Illinois) (collectively with Advance Ross Electronics Corporation, "Advance Ross"), and Harve A. Ferrill, President of Advance Ross Corporation, for wrongful discharge under the Employment Agreement between Green and Advance Ross dated May 7, 1975. Green's allegations included, *inter alia,* the following two paragraphs which summarized Green's basis for the alleged wrongful discharge:

> "15. A controversy existed between Green and Ferril [sic] before Green's wrongful discharge. Ferril ordered Green to discharge Green's father. He [Green's father] had worked actively for Advance Ross Electronics Corporation since 1970 and had worked for the business before that since the time that he founded it. Green obeyed Ferrill's order over his own objection. Green ordered his father discharged but also ordered that his father was to receive six months termination pay. This was in accordance with the practice of the company. Such termination pay was within Green's discretion to set and his discretion was reasonably exercised in view of his father's age and the difficulty he would experience in finding substitute employment. The funds for the payment of the termination pay were approved by Harve Ferril or a subordinate in the Chicago office. Subsequent to approval and payment Harve Ferril demanded that Green refund the money and Green refused.
>
> 16. "Green was summarily discharged in breach of the contract by these defendants for the specific purpose of

> injuring him financially and injuring his reputation all in retaliation for his refusal to refund to the company the termination pay properly authorized and paid to his father." Complaint for Injunction and Money Damages for Wrongful Discharge, appended to Defendant's Motion to Dismiss and Plea in Abatement filed herein.*

Advance Ross denied these allegations, and answered that Green was terminated for proper reasons. A-14.

Five days after filing the Illinois Action, Green filed this action ("Texas Action"). The Texas Action seeks damages based upon an alleged violation of a Lease Agreement which ties the rent paid to Green to his employment with Advance Ross. Under the Lease Agreement the rent payable by Advance Ross to Green as lessor-trustee is payable at a reduced rate if Green's employment with Advance Ross was terminated by Advance Ross "for cause." A-14. The gist of the Texas Action is as follows:

> "V. Plaintiff would show that Defendants reduced said payments allegedly on the premise that Plaintiff was terminated from his employment with Defendants for cause when in fact Plaintiff denies he was terminated for cause and would show that he was arbitrarily and capriciously terminated without good cause at the insistence of Harve Ferrell [sic], President of Advance Ross Corporation, acting in concert with other employees of Advance Ross Corporation and its subsidiaries." Plaintiff's Original Petition (emphasis added).

The Lease Agreement involved in the Texas Action incorporated by reference the Employment Agreement, which was the basis of the Illinois Action, as Exhibit E, and both the Lease Agreement and the Employment Agreement bear the same execution and expiration dates.

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* Citations to the record herein are to the portions reproduced in the Appendix hereto ("A") or to the pages in particular documents identified by name.

In March 1979, petitioners filed their verified Motion to Dismiss and Plea in Abatement in the Texas Action. (p. 2) stating in part:

> "The alleged cause of action, subject matter and issues in this and the said prior Illinois suit are the same, and not different; the said Illinois suit is still pending in the Court aforesaid and discovery therein has been commenced and is proceeding; a trial and judgment in said Illinois cause will be determinative of all the issues presented in this subsequent suit."

Defendants' Amended Plea in Abatement, filed on May 27, 1980, brought to the Texas court's attention excerpts from the transcript of the Illinois Action which confirmed that the grounds for Green's termination were directly at issue in Chicago.

On May 14, 1979, the court in Illinois dismissed Green's motion for a preliminary injunction after a full hearing which included testimony by Green as the principal witness. Green's own testimony showed conclusively that the grounds for Green's termination were directly at issue in Illinois:

> "Q. What reason was given to you for your firing on October 30, 1978?
>
> "A. The reason given to me was because I didn't have the authority to pay the severance pay." A-14.

At the preliminary injunction hearing, the court in Illinois summed up the wrongful discharge case in a way that made it plain that discharge for cause was at issue in that case:

> "Mr. Green, one of the Greens, gave his father some $24,000. Then he is fired. He is first asked to give it—return it. Then he is fired.
>
> "The other side says that . . . he was fired for cause." A-15.

The subject of the rent payable under the lease agreement also was a subject of Green's testimony in Chicago:

> "Q. And did he on that occasion [October 30, 1978] state that the defendants were invoking the clause on the lease agreement on plant 2, which allowed the defendants to

> reduce the monthly rental payments from 1.5 percent to 1.1 percent a month of the total cost of the facility; and, therefore, the rental payment would be $10,350.85 a month in the future? Didn't he tell you that?
>
> "A. Yes." A-15.

The trial court overruled the plea in abatement on the first day of trial, and the cause was submitted to a jury upon a special "inquiring" as to whether Advance Ross had cause for terminating Green's employment. In response the jury said "we do not". A-6. Judgment was rendered for Green from which Advance Ross appealed.

Advance Ross contended in its first point of error to the court of appeals that the trial court had erred in overruling the plea in abatement. The court of appeals overruled this point of error as follows (A-6):

> "While the record shows that the trial court conducted a hearing on the plea in abatement, the record does not contain any order or ruling thereon. Since however defendants concede that the plea was overruled, we shall proceed accordingly. The record before us however does not contain a statement of facts showing what evidence, if any, was adduced at the hearing on the plea in abatement. Since the propriety of a court's order overruling a plea in abatement depends upon the evidence adduced at the hearing on the plea, we are unable to determine whether or not the court erred in overruling the plea in the absence of a statement of facts. [Citing authorities.]"

Advance Ross's motion for rehearing (p. 3) argued, *inter alia,* that

> "The evidence in reference to the Plea in Abatement was the exhibits attached to such Plea in Abatement. Such exhibits clearly show that Roy W. Green Jr. had filed a lawsuit in the State of Illinois in reference to his discharge and that such employment agreement provided that it would be governed in all respects by the laws of the State of Illinois.

> Further, attached to the Plea in Abatement were excerpts from the deposition of Roy W. Green Jr. taken in the Illinois case."

The court of appeals denied the motion for rehearing on November 19, 1981. A-11.

The Application for Writ of Error to the Texas Supreme Court by Advance Ross again sought a reversal of the decision by the district court on the plea in abatement. The application (p. 13) also renewed the argument that the evidence in support of the plea in abatement is contained within the exhibits thereto, citing pages 46-51 of the transcript.

The Texas Supreme Court overruled the application for a writ of error on February 24, 1982. A-12.

1. THE REFUSAL TO ABATE A LAWSUIT WHEN THE PLAINTIFF PREVIOUSLY HAD FILED A LAWSUIT IN ANOTHER STATE RAISING THE IDENTICAL ISSUE PRESENTS A NOVEL AND IMPORTANT QUESTION UNDER THE FULL FAITH AND CREDIT CLAUSE.

Article IV, Section 1 of the United States Constitution states as follows:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and *judicial Proceedings* of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and proceedings shall be proved, and the Effect thereof." (Emphasis added).

The overruling by the Texas courts of petitioners' plea in abatement was a violation of the principle embodied in the Full Faith and Credit Clause that each state shall give deference to the *judicial proceedings* of every other state.

Although the Full Faith and Credit Clause is generally applied to judgments, the Constitution by its terms refers to "Proceedings" as well as judgments. We submit that when the Texas courts

allowed Green to proceed on the question of termination for cause when the identical issue had been raised by Green in an Illinois lawsuit filed only five days before the Texas lawsuit, the Texas courts were not giving full faith and credit to the Illinois proceeding commenced by Green. Rather, the Texas courts acted as if the Illinois Action did not exist with the result that the matter of Green's termination will be tried in two states. This splitting of a claim into two proceedings the Full Faith and Credit Clause should not permit.

Decisions which define the application of the Full Faith and Credit Clause solely in the context of final judgments* are inapposite where, as here, the plaintiff has sought "two bites of the apple" by filing lawsuits almost simultaneously and both proceedings are pending. The only way to prevent this abuse, which arises out of the relationship between the states in our federal system, is for the courts of one state to respect the judicial proceedings pending in another state and to abate the proceeding which commenced on the later date.

As this Court held in *Magnolia Petroleum Co.* v. *Hunt,* 320 U.S. 430, 444 (1943) (Texas compensation award barred Louisiana recovery despite allegation that two causes of action were involved):

> "The whole tendency of our decisions under the full faith and credit clause is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot split up his claim and *'a fortiori* he cannot divide the grounds of recovery.' *United States* v. *California & Oregon Land Co.,* 192 U.S. 355, 358 (1904)."

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* *E.g., Solomon* v. *Beatty,* 68 So.2d 881 (Fla. 1953), *cert. denied,* 347 U.S. 988 (1954).

The decision cited in *Magnolia Petroleum, United States* v. *California & Oregon Land Co.*, 192 U.S. 355, 358 (1904), was written by Justice Oliver Wendell Holmes. The Court held therein that a decree rendered upon a bill in equity to have patents for land declared void and to establish title of the United States was a bar to a subsequent bill brought against the same defendants to convey the same land on another basis. This Court rejected the attempt to split the lawsuit into two pieces (*id.* at 358):

> "The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means, that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee."

Under the doctrine cited above, that a whole cause should be tried at one time, it was a violation of the Full Faith and Credit Clause to allow Green to try one part of his case in Texas when he had already filed the Illinois Action. The fact that in both actions Green alone is the plaintiff and Advance Ross Electronics Corporation and Advance Ross Corporation are the defendants strengthens the policy against piecemeal litigation.*

Questions arising under the Full Faith and Credit Clause are assertions of federal right which are for this Court to decide. As the Court held in *Magnolia Petroleum Co., supra,* 320 U.S. at 443:

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* For these purposes, the fact that Harve A. Ferrill, President of the Advance Ross Corporation, is an additional defendant herein is of no significance. Mr. Ferrill's role in Green's termination as President of Advance Ross is at issue in both lawsuits, as the excerpts from both the Illinois complaint and the Texas petition, quoted above at pp. 3-4, demonstrate conclusively.

> "When a state court refuses credit to the judgment of a sister state because of its opinion of the nature of the cause of action or the judgment in which it is merged, an asserted federal right is denied and the sufficiency of the grounds of denial are for this Court to decide. *Titus* v. *Wallick*, 306 U.S. 282, 291 and cases cited (1939); and see *Adam* v. *Saenger*, 303 U.S. 59, 64; and cases cited (1938)."

Petitioners respectfully submit that it was a violation of the Full Faith and Credit Clause, and of the policies of reciprocal relations between the states which underlie it, for the Texas courts to overrule the plea in abatement.

2. THE DECISION BY THE TEXAS COURTS TO PROCEED TO JUDGMENT DESPITE THE FACT THAT THE SAME PLAINTIFF PREVIOUSLY HAD RAISED THE SAME ISSUE IN ANOTHER STATE WAS AN ABUSE OF THE JUDICIAL PROCESS AND A VIOLATION OF DUE PROCESS WHICH CALLS FOR CORRECTIVE REVIEW BY THIS COURT.

This Court has often declared that review lies with this Court to correct abuses of judicial process, particularly when there is a need to coordinate multiple litigation. This is the precise problem at issue here.

For example, in *Kerotest Mfg. Co.* v. *C-O-Two Co.*, 342 U.S. 180, 183 (1952), involving patent litigation in the federal district courts of Delaware and Illinois, the Court said:

> "Inasmuch as a question of importance to the conduct of multiple litigation in the federal judicial system was involved, we granted certiorari."

Affirming a decision by the Court of Appeals for the Third Circuit that the Delaware Court should defer to the Illinois Court, this Court, through Justice Frankfurter, said (*id.* at 185):

> "If in a rare instance a district judge abuses the discretionary authority the want of which precludes an effective, independent judiciary, there is always the opportunity for corrective review by a Court of Appeals *and ultimately by this Court.*" (Emphasis added).

This intense concern by this Court to avoid multiple litigation has been expressed in cases concerning the power of the courts to grant a stay in one action pending the disposition of proceedings in another action. Even in cases in which the parties to the two actions are not identical, the Court has held that there is inherent power and *obligation* to coordinate the business of the courts so as to avoid a scandal in the administration of justice. In *Landis* v. *North American Co.*, 299 U.S. 248, 255 (1936), Justice Cardozo said for the Court:

> "Impressed with the likelihood or danger of abuse, some courts have stated broadly that, irrespective of particular conditions, there is no power by a stay to compel an unwilling litigant to wait upon the outcome of a controversy to which he is a stranger.
>
> * * *
>
> "Such a formula, as we view it, is too mechanical and narrow. *Kansas City Southern Ry.* v. *United States,* [282 U.S. 760, 763 (1931)]; *Friedman* v. *Harrington,* 56 Fed. 860; *Amos* v. *Chadwick,* L.R. 9 Ch. Div. 459; 4 *id.* 869, 872. All the cases advancing it could have been adequately disposed of on the ground that discretion was abused by a stay of indefinite duration in the absence of a pressing need. If they stand for more than this, we are unwilling to accept them. *Occasions may arise when it would be a 'scandal to the administration of justice' in the phrase of Jessel,* M.R. (*Amos* v. *Chadwick,* L.R. 9 Ch. Div. 459, 462), *if power to coordinate the business of the court efficiently and sensibly were lacking altogether.*" (Emphasis added).

This case presents a stronger need for coordination between the courts than *Landis*. In *Landis,* the parties to the two proceedings were not identical, and there was strong public concern in the subject matter of the litigation, the constitutionality of the Public Utility Holding Company Act of 1935. In this case, the parties to the two lawsuits are virtually identical, and Green commenced both lawsuits himself as plaintiff. The overruling of the plea in

abatement is the kind of "scandal to the administration of justice" of which Justice Cardozo spoke which results when courts do not coordinate their business efficiently and sensibly.

Decisions arising in the analogous context of federal-state relations offer support for the argument that the contemporaneous exercise of jurisdiction by two state courts must give way to wise judicial administration. In *Colorado River Water Conservation District* v. *United States,* 424 U.S. 800, 817 (1976), the Court held:

> "there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts. These principles rest on considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.' "

Among the factors which this Court has cited for federal courts to consider in deciding whether to exercise concurrent jurisdiction are the following (*id.* at 818-19):

> "the inconvenience of the federal forum, cf. *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947); the desirability of avoiding piecemeal litigation, cf. *Brillhart* v. *Excess Ins. Co.,* 316 U.S. 491, 495 (1942); and the order in which jurisdiction was obtained by the concurrent forums, *Pacific Live Stock Co.* v. *Oregon Water Bd.,* 241 U.S. 440, 447 (1916). No one factor is necessarily determinative; a careful considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required . . ."

Based upon these principles, the plea in abatement should have been granted. The desirability of avoiding piecemeal litigation would have been served better by trying what was essentially a wrongful discharge case in the context of the breach of the Employment Agreement, not the Lease Agreement. Further, the Illinois Action was filed before the Texas Action, and the Illinois court obtained jurisdiction before the Texas court. The fact that

it was the plaintiff himself who first chose Illinois, the headquarters state of Advance Ross Corporation, is another important factor which argues in favor of deference to the Illinois court.

It was a "scandal to the administration of justice" rising to the level of a denial of due process to allow the Texas Action to proceed as if the Illinois Action did not exist. This Court should review that decision which could have the effect of multiplying litigation enormously by allowing any person who can afford to bring a lawsuit in more than one state to require different courts to review the same question while the plaintiff decides which lawsuit he should proceed upon.

3. THE ARBITRARY REFUSAL OF THE TEXAS COURTS TO REVIEW THE MERITS OF THE PLEA IN ABATEMENT RAISES AN IMPORTANT QUESTION OF FUNDAMENTAL FAIRNESS ARISING UNDER THE DUE PROCESS CLAUSE.

The trial court denied the plea in abatement without even handing down a written order, and the court of appeals affirmed that denial on the basis that since the propriety of a court's order overruling a plea in abatement depends upon the evidence adduced at the hearing on the plea, the court was unable to determine whether or not the court had erred in overruling the plea in the absence of a statement of facts. The court of appeals thus arbitrarily overlooked the pleas in abatement themselves, which were in the nature of sworn affidavits, and the exhibits thereto.*

Due process is not a fixed concept, but rather embodies the concept of fundamental fairness. As this Court held in *Lassiter* v.

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*The court of appeals also overlooked Texas precedents in which the court reviewed the record as a whole in ruling on the abatement issue when there was no statement of facts showing what evidence was adduced at the hearing; *e.g.*, *Geyer* v. *Jones*, 93 S.W. 2d 1192, 1193-94 (Tex. Civ. App. 1936) (writ dismissed).

Department of Social Service of Durham County, 452 U.S. 18, 24-25, 101 S. Ct. 2153, 2158 (1981):

> "For all of its consequence, 'due process' has never been, and perhaps can never be, precisely defined. 'Unlike some legal rules,' this Court has said, due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances.' *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 895, 81 S. Ct. 1743, 1748, 6 L.Ed. 2d 1230 (1961). Rather, the phrase expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake."

Where, as here, there is an arbitrary failure to address an argument, there is a denial of due process. As Mr. Justice Sutherland wrote fifty years ago in the seminal case of *Powell* v. *Alabama,* 287 U.S. 45, 69 (1932):

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

This Court has admonished the lower courts particularly for taking a cavalier attitude toward important questions of the coordination of business between the courts. In *Brillhart* v. *Excess Insurance Co.,* 316 U.S. 491 (1942), a district court dismissed a case because of a pending state court case involving the same issues. The court of appeals reversed, holding that the district court had abused its discretion. Reversing, this Court properly criticized both lower courts for their failure to determine the nature of the pending state court action in detail (*id.* at 495-96, 497-98):

> "*It is enough that it appears from the record before us that the District Court did not consider* whether, under applicable local law, the claims sought to be adjudicated by the respondent in this suit for a declaratory judgment had either

> been foreclosed by Missouri law or could adequately be tested in the garnishment proceeding pending in the Missouri state court. . . Nor did the Circuit Court of Appeals, in reversing the judgment of the District Court, *purport to find that under controlling Missouri law the issues set up by the respondent in this suit could not be contested in the pending Missouri proceeding.*
>
> * * *
>
> "We are not concerned here with the burden of proof in establishing facts as to which only the parties to a private litigation are interested. We are concerned rather with the duty of the federal courts to determine legal issues governing the proper exercise of their jurisdiction." (Emphasis added).

It was the duty of the Texas courts to examine the matters raised by the plea in abatement and not to dismiss the plea without such an examination. This refusal to consider an important issue calls for the granting of the writ of certiorari by this Court to vindicate the concept of fundamental fairness embodied in the Due Process Clause.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Twelfth Supreme Judicial Circuit, Tyler, Texas.

Respectfully submitted,

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May 24, 1982

Appendix

NO. 79-344-A

ROY WESLEY GREEN, JR.	
VS.	In The 188th District
ADVANCE ROSS ELECTRONICS CORP. AND ADVANCE ROSS CORPORATION	Court In And For Gregg County, Texas

JUDGMENT

On the 18th day of June, 1980, came on to be heard the above entitled and numbered cause, and Roy Wesley Green, Jr., Trustee, Plaintiff appeared in person and by attorney of record and announced ready for trial.

Advance Ross Electronics Corporation and Advance Ross Corporation, Defendants, appeared in person and by attorney of record, and announced ready for trial. A jury having been previously demanded, a jury consisting of twelve (12) good and lawful men and women was duly impaneled and the case proceeded to trial.

At the conclusion of the evidence, the Court submitted the case to the jury on Special Issues. The charge of the Court, including the Special Issue, and the verdict of the jury, are incorporated herein for all purposes by reference. After the jury returned its verdict, Plaintiff moved for judgment accordingly.

It appears to the Court the Judgment should be rendered upon the verdict in favor of Plaintiff and against Defendants jointly and severally for Plaintiff's actual damages in the amount of SEVENTY FIVE THOUSAND TWO HUNDRED SEVENTY-EIGHT AND 80/100 ($75,278.80) DOLLARS.

It further appears to the Court that Judgment should be rendered in favor of Plaintiff and against Defendants jointly and severally for interest in the amount of FIVE THOUSAND NINE

HUNDRED TWENTY AND 21/100 ($5,920.21) DOLLARS representing prejudgment interest at the rate of nine (9%) percent per annum through 17th.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that Plaintiff Roy Wesley Green, Jr., Trustee, have and recover of and from the Defendants Advance Ross Electronics Corporation and Advance Ross Corporation jointly and severally the sum of EIGHTY-ONE THOUSAND ONE HUNDRED NINETY-NINE AND 01/100 ($81,199.01) DOLLARS, with interest thereon at the rate of nine (9%) percent per annum from date of judgment until paid, through March together with all costs of court in this behalf expended.

Plaintiff Roy Wesley Green, Jr., is allowed such writs and processes as may be necessary for the enforcement and collection of this Judgment.

SIGNED this 30th day of June, 1980.

/s/ MARCUS VASCOCU
Judge Presiding

Notice of Judgment

COURT OF APPEALS
Twelfth Supreme Judicial District
306 County Courthouse
Tyler, Texas 75702

Barbara A. Holman
Clerk
(214) 593-8471

October 29, 1981

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Gentlemen:

You are hereby notified that, in the case of *Advance Ross Electronics Corporation & Advance Ross Corporation* vs. *Roy Wesley Green, Jr., Trustee,* our No. 1467, from Gregg County, the following decision and order was this day made and entered by this Court:

Judgment affirmed. Copies of the judgment and opinion of the court enclosed.

Respectfully yours,

/s/ BARBARA A. HOLMAN *Clerk*

By _____ *Deputy*

COURT OF CIVIL APPEALS
Twelfth Supreme Judicial District

At Tyler, Texas

JUDGMENT RENDERED—OCTOBER 29, 1981

Justice Writing: JAMES H. MOORE, *Associate Justice*

Cause No. 1467: ADVANCE ROSS ELECTRONICS CORPORATION AND ADVANCE ROSS CORPORATION VS. ROY WESLEY GREEN, JR., *Trustee*—Appeal from 188th District Court of Gregg County

THIS CAUSE came on to be heard on the transcript of the record; and the same being inspected, it is the opinion of the Court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the Court below be in all things affirmed; that the Appellee Roy Wesley Green, Jr., recover of and from the appellants, Advance Ross Electronics Corporation and Advance Ross Corporation, jointly and severally and from John M. Smith and Jerry S. Harris, sureties upon appellants' appeal bond and from Northwestern National Insurance Company, surety upon appellants' supersedeas bond, the full amount of the judgment recovered by said appellee from the appellants, Advance Ross Electronics Corporation and Advance Ross Corporation, in the court below, together with all costs of this appeal, for all of which execution may issue; and that this decision be certified to the court below for observance.

No. 1467

IN THE COURT OF APPEALS

Twelfth Supreme Judicial District of Texas

Tyler, Texas

ADVANCE ROSS ELECTRONICS CORPORATION AND ADVANCE ROSS CORPORATION, *Appellants*	Appeal from the 188th Judicial
VS.	District Court
ROY WESLEY GREEN, JR., TRUSTEE, *Appellee*	of Gregg County, Texas

This is an action for breach of a written lease agreement. Plaintiff, Roy Wesley Green (Green), sued defendants, Advance Ross Electronics Corporation (Electronics) and Advance Ross Corporation (Ross), for money damages brought about by the reduction by defendants of the amount of the monthly rental payments due under a lease. The lease was signed the same day plaintiff entered into an employment contract with defendants. The pertinent part of the lease stated:

> Lessee (defendants herein) agrees to pay Lessor (plaintiff herein) as rental for the use of said premises a total monthly rental of one and five-tenths per cent (1.5%) of the total aggregate cost of the real estate, improvements, and equipment, payable in monthly installments in advance. . . . In the event Lessor's employment with Lessee is terminated by Lessor for any reason or terminated by Lessee for cause, then the rental rates for such month or part thereof, after that date shall be reduced to an amount equal to 1.1% of the total aggregate costs in lieu of the 1.5% heretofore mentioned.

In 1980 defendants terminated plaintiff's employment and accordingly reduced the rental payments. Plaintiff thereupon brought suit for breach of the lease agreement contending that defendants lacked cause to terminate his employment and therefore had no right to reduce the monthly rentals.

Trial was before a jury. The cause was submitted to a jury upon a special issue inquiring as to whether defendants had cause for terminating plaintiff's employment. In response the jury answered: "We do not." Judgment was rendered for plaintiff for delinquent rent in the amount of $81,000, from which defendants appealed.

We affirm.

Defendants bring eight points of error. Under the first point of error defendants contend that the trial court abused its discretion in overruling their plea in abatement. In this connection the record shows that defendants filed a plea in abatement alleging prior to the time plaintiff filed the present suit, he had instituted suit against defendants in Chicago, Illinois, for breach of the same employment contract involved in the present case and that the present suit should be abated on the grounds of comity until the suit in Illinois was finally determined.

While the record shows that the trial court conducted a hearing on the plea in abatement, the record does not contain any order or ruling thereon. Since however defendants concede that the plea was overruled, we shall proceed accordingly. The record before us however does not contain a statement of facts showing what evidence, if any, was adduced at the hearing on the plea in abatement. Since the propriety of a court's order overruling a plea in abatement depends upon the evidence adduced at the hearing on the plea, we are unable to determine whether or not the court erred in overruling the plea in the absence of a statement of facts. *Vestal* v. *Jackson,* 598 S.W.2d 724 (Tex. Civ. App.—Waco 1980, no writ); *Rancho Camille, S.A.* v. *Beachum,* 596 S.W.2d 632 (Tex. Civ. App.—Waco 1980, no writ); *Geyer* v. *Jones,* 93 S.W.2d 1192 (Tex. Civ. App.—San Antonio 1936, writ dism'd). Accordingly, defendants' first point of error is overruled.

By points two through six defendants seek a reversal asserting that the trial court erred in overruling their motion for instructed verdict and for judgment *non obstante veredicto,* because there was no evidence to support the submission of the issue to the jury or to support the jury's finding thereon.

The cause was submitted to the jury upon a single special issue reading as follows: "Do you find from a preponderance of the evidence that Roy Wesley Green, Jr., was terminated from his employment with defendants for cause as that term is defined below?" In response to the issue, the jury answered: "We do not."

In connection with the foregoing special issue, the court instructed the jury as follows:

> You are instructed that cause for discharge is meant a failure of an employee to perform those duties in the scope of his employment as a man of ordinary prudence in an industry would have done under the same or similar circumstances, or the commission of acts by the employee in the scope of his employment which a man of ordinary prudence would not have done under the same or similar circumstances.

Defendants rely on the rule that there is an implied obligation on the part of an employee to do no act which has a tendency to injure the employer's business or financial interest and any breach of this obligation will justify the employer in discharging the employee from his services. *Turner* v. *Byers,* 562 S.W.2d 507 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.); *Wildman* v. *Ritter,* 469 S.W.2d 446 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.).

Where an agreement requires cause to terminate an employee, the burden of proof for establishing cause rests upon the employer. *Langford* v. *Home for the Aged Masons,* 617 S.W.2d 778 (Tex. Civ. App.—Fort Worth 1981, no writ history); *Moore* v. *Missouri Pacific Railroad Co.,* 264 Fed.2d 754 (5th Cir. 1959).

Defendants maintain that they had a right to discharge plaintiff for cause inasmuch as the undisputed proof shows that plaintiff, while acting as president of Advance Ross Electronics caused the company to pay to his father, Roy W. Green, Sr., the sum of approximately $24,000 as severance pay without the knowledge or consent of the company. The question of whether plaintiff was discharged for cause depends on whether the plaintiff acted as a

man of ordinary prudence in causing the company to pay severance pay to his father. Thus, the question presented calls for a review of the evidence.

In 1970, plaintiff, Roy W. Green, together with his father, Roy W. Green, Sr., were operating a business in Longview, Texas, under the name of Roy W. Green Company. During 1970 the Greens sold their business to defendants and the name of the business was changed to Advance Ross Steel Corporation. The Greens continued to work for Advance Ross Steel Corporation for several years. During this time both plaintiff and his father worked under a written contract of employment with defendants. When the employment contracts expired in 1973, the parties decided that it would not be necessary to have a written contract of employment. In 1975 plaintiff was made president of Advance Electronics the parent company, and his father, Roy W. Green, Sr., was made vice-president of Ross Electronics.

On May 7, 1975, plaintiff, Roy W. Green, Jr., entered into a written lease agreement with defendants, which lease agreement is the basis of this suit. Under the terms of the agreement, plaintiff leased defendants certain property situated in Longview, Texas, defendants agreeing to pay a stipulated amount for monthly rental of such property. The lease agreement provided that in the event plaintiff decided to terminate his employment with Advance Ross Electronics or if his employment be terminated by defendants for cause, the monthly lease payments would be reduced by a certain amount.

In August 1978, plaintiff was instructed by defendants to terminate his father's employment with Ross Electronics as the company had concluded that his employment was no longer necessary. Thereafter plaintiff discharged his father and paid him severance pay in the amount of $24,000 which was equal to six months salary. Defendants notified plaintiff that they were not satisfied with his paying his father severance pay and thereafter on October 30, 1978, terminated plaintiff's employment. Thereupon defendants reduced the rental payments under the terms of

the lease agreement and plaintiff instituted this suit alleging that defendants breached the lease agreement inasmuch as his termination was without cause.

The evidence shows that the plaintiff was given full authority to operate the company, to hire and fire employees and write checks on the company. Further, the evidence shows that defendants had made severance payments to other employees over a period of several years of which plaintiff had knowledge. Plaintiff testified that when the written employment contract held by him and his father expired in 1973, Mr. Buckingham, who was then president and Chairman of the Board of both corporate defendants, promised that if either he or his father were ever terminated, they would each be given one year's severance pay. This testimony was never refuted or denied by the company. Hugh Holmes, a management consultant called by the plaintiff, testified that it was customary in the business in which defendants were engaged, to pay severance pay and that severance payment made in this instance and under the existing circumstances was usual, customary and reasonable.

In arguing that plaintiff's conduct in making the severance payment failed to measure up to that of an ordinary prudent person in the same or similar circumstances, defendants rely on the testimony showing that approximately a year before his discharge, plaintiff's father suffered a heart attack and was away from work for some time. Defendants further rely on the testimony showing that the company had lost approximately a half million dollars during 1978 and that plaintiff knew of the loss at the time the severance payment was made. Defendants also rely upon the fact that plaintiff failed to get the approval from the company prior to making the severance payment.

We find no merit in the contention that the trial court erred in overruling defendants' motion for instructed verdict. In our view there was ample evidence to raise a fact issue for the jury upon the question of whether defendants had cause to terminate plaintiff's employment especially since the jury was instructed that plaintiff's conduct in making the severance payment was to be

measured by that of an ordinary prudent person under the same or similar circumstances. Points two and three are overruled.

With regard to defendants' point contending that the trial court erred in refusing to render judgment non obstante veredicto, we find no showing in the record that the motion was presented to or acted on by the trial court. The record therefore preserves nothing for review. *Murphy* v. *Maroney,* 456 S.W.2d 77 (Tex. Civ. App.—Waco 1970, writ ref'd n.r.e.). The fourth point is overruled.

With regard to defendants' "no evidence" point, it should be noted that the jury returned a negative finding to an issue on which defendants had the burden of proof. The finding does not mean that defendants did not have just cause to discharge plaintiff, but merely means that the defendants failed to discharge their burden of proving by a preponderance of the evidence that they had cause to discharge plaintiff. *C & R Transports, Inc.* v. *Campbell,* 406 S.W.2d 191 (Tex. 1966). Under these circumstances, the complaining party is placed in the position of having to demonstrate that the evidence establishes the issue as a matter of law. "No Evidence" and "Insufficient Evidence" Points of Error, 38 Texas Law Review 361, 363 (1960). In our view the record in the instant case falls short of establishing, as a matter of law, that defendants had cause to discharge plaintiff. Points five and six are overruled.

After a review of the entire record and after weighing and balancing all the evidence, both that against and in favor of the jury's finding, we find that we are unable to agree with defendants' contention that the evidence is insufficient to support the jury's finding or that the finding is against the overwhelming weight and preponderance of the evidence. Accordingly points seven and eight are overruled.

The judgment is affirmed.

JAMES H. MOORE
Associate Justice

Opinion delivered October 29, 1981.

Notice of Judgment

COURT OF APPEALS
Twelfth Supreme Judicial District
306 County Courthouse
Tyler, Texas 75702

Barbara A. Holman
Clerk
(214) 593-8471

November 19, 1981

MR. JOHN MACK SMITH
Roberts, Harbour Law Firm
P.O. Drawer 2072
Longview, Texas 75606

MR. JOE GREEN
P.O. Box 2845
Longview, Texas 75606

Gentlemen:

You are hereby notified that, in the case of *Advance Ross Electronics Corporation & Advance Ross Corporation* vs. *Roy Wesley Green, Jr., Trustee,* our No. 1467, from Gregg County, the following decision and order was this day made and entered by this Court:

Motion for rehearing overruled.

Respectfully yours,

/s/ BARBARA A. HOLMAN *Clerk*

By _____ *Deputy*

CLERK'S OFFICE - SUPREME COURT

Austin, Texas

Feb. 24, 1982

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of No. C-937 *Advance Ross Electronics Corporation, et al.* vs. *Roy Wesley Green, Jr., Trustee* was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON, *Clerk*

NO. 79-344-A

ROY WESLEY GREEN, JR., *Trustee*	In the District Court
v.	of
ADVANCE ROSS ELECTRONICS CORPORATION AND ADVANCE ROSS CORPORATION	Gregg County, Texas

DEFENDANTS' SECOND AMENDED PLEA IN ABATEMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW ADVANCE ROSS ELECTRONICS CORPORATION AND ADVANCE ROSS CORPORATION, Defendants in the above styled and numbered cause and file this their Second Amended Plea in Abatement and for such Plea would respectfully show the Court as follows:

I

On February 15, 1979 the Plaintiff, Roy Wesley Green, Jr., filed a wrongful discharge action in Cook County, Illinois, which put at issue the *only* issue in this lease action, namely whether Plaintiff was terminated for cause or whether he was fired arbitrarily and capriciously.

Wesley Green's Chicago Complaint for Injunction and Money Damages for Wrongful Discharge contains three counts: Count 1 for preliminary injunction, Count 2 for money damages, and Count 3 for punitive damages. The grounds for Green's termination is a key part of Count 3 of the wrongful discharge suit in Chicago. In Count 3, ¶16, Green alleges that

> "Green was summarily discharged . . . for the specific purpose of injuring him financially and injuring his reputation

all in retaliation for his refusal to refund to the company the termination pay properly authorized and paid to his father."

Defendants deny these allegations, and state that Green was terminated for proper reasons (Answer, Count III ¶¶15-18).

II

Six days after filing the Chicago wrongful discharge action, Wesley Green filed this lease action in Texas. It involves the identical parties as the action Green brought in Chicago. The third paragraph of the Lease Agreement signed at the same time as Wesley Green's employment contract governs this dispute. If Wesley Green was terminated "for cause", then the current rent being paid by Advance Ross is proper. If Wesley Green was not terminated for cause, then Advance Ross owes Wesley Green the higher rent. The only issue set forth in his complaint is whether Wesley Green was "arbitrarily and capriciously terminated" or whether he was terminated for "cause". That is what this lawsuit is all about.

III

On May 14, 1979, the court in Chicago dismissed Green's motion for a preliminary injunction after a full hearing which included testimony by Green as the principal witness. Green's testimony confirms that the grounds for Wesley Green's termination are directly at issue in Chicago:

"Q. What reason was given to you for your firing on October 30, 1978?

"A. The reason given to me was because I didn't have the authority to pay the severance pay." (Direct Examination, pp. 29-30)

At the preliminary injunction hearing, the court in Chicago summed up the wrongful discharge case in a way that makes it plain that discharge for cause is at issue in that case:

"Mr. Green, one of the Greens, gave his father some $24,000. Then he is fired. He is first asked to give it—return it. Then he is fired."

"The other side says that . . . he was fired for cause." (Transcript, p. 3)

The subject of the rent payable under the lease agreement also was a subject of Wesley Green's testimony in Chicago:

"Q. And did he on that occasion (October 30, 1978) state that the defendants were invoking the clause on the lease agreement on plant 2, which allowed the defendants to reduce the monthly rental payments from 1.5 percent to 1.1 percent a month of the total cost of the facility; and, therefore, the rental payment would be $10,350.85 a month in the future? Didn't he tell you that?

"A. Yes." (Cross Examination, pp. 47-48)

The Chicago action is very much a live case, and the grounds for Wesley Green's termination remain a central question in it. There have been numerous motions heard and considerable discovery taken in the Chicago action. Most of the depositions have explored the grounds for Green's termination.

There can be no doubt that the only issue pending in Texas is an ingredient of Wesley Green's *previously-filed* wrongful discharge action in Chicago. Green can win Count 3 of his Chicago action only if he can show he was not discharged for cause. That is the same—and only—issue involved in this action.

What Wesley Green wants is two bites of the apple, a chance to win in Texas if he loses in Chicago. He is the one who chose the Chicago court, and he should live with that decision. It would be unfair to give him the opportunity to try the same question against the same parties twice.

WHEREFORE, PREMISES CONSIDERED, your Defendants pray that this action be dismissed, or in the alternative, abated, pending

disposition and final judgment in the Illinois cause of action referred to above, and for such other and further relief to which Defendants may be entitled.

Respectfully submitted,

ROBERTS, HARBOUR LAW FIRM
Post Office Drawer 2072
Longview, Texas 75606
214/757-4001

By: /s/ JOHN M. SMITH
John M. Smith
Attorneys for Defendants

STATE OF TEXAS }
COUNTY OF GREGG }

BEFORE ME, the undersigned authority, on this day personally appeared JOHN M. SMITH, who, after being by me first duly sworn, on oath deposes and says that he is the attorney of record for ADVANCE ROSS ELECTRONICS CORPORATION and ADVANCE ROSS CORPORATION, and as such attorney is authorized to make this affidavit; that he has read the above and foregoing instrument and the statements of facts contained therein are true and correct.

/s/ JOHN M. SMITH
John M. Smith

SUBSCRIBED AND SWORN TO BEFORE ME by JOHN M. SMITH on this the 4th day of June, 1980.

/s/ PEGGY A. MOOMAN
Notary Public, Gregg County, Texas

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was placed in the mail this 4th day of June, 1980, to Mr. Guy N. Harrison, Jr., Attorney for Plaintiff, Post Office Box 2845, Longview, Texas, by Certified Mail, Return Receipt Requested.

/s/ JOHN M. SMITH
John M. Smith

Opposition

Office - Supreme Court, U.S.
FILED
JUN 9 1982
ALEXANDER L. STEVAS
CLERK

No. 81-2168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ADVANCE ROSS ELECTRONICS CORPORATION and
ADVANCE ROSS CORPORATION,
Petitioners,

v.

ROY WESLEY GREEN, JR., TRUSTEE,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Twelfth Supreme Judicial District, Tyler, Texas

---

BRIEF IN OPPOSITION OF RESPONDENT ROY WESLEY GREEN, JR. TRUSTEE

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QUESTIONS PRESENTED

I. Should the Constitution be newly interpreted to mandate a single national standard of when one court must defer in an action because a related action, upon which there have been no proceedings on the merits, has been filed in a different forum?

II. Does appellate court application of a long-standing procedural requirement to an issue collateral to the merits deny due process of law?

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On Petition for a Writ of Certiorari to the Court of Appeals for the Twelfth Supreme Judicial District, Tyler, Texas

---

BRIEF IN OPPOSITION OF RESPONDENT ROY WESLEY GREEN, JR. TRUSTEE

STATEMENT OF THE CASE

Advance Ross Corporation purchased the business of Roy Wesley Green, Jr. and at the same time negotiated an employment contract with Green. When the employment contract expired in 1973 the parties determined that a further written contract would be unnecessary. Two years later the parties entered into the lease agreement that is the subject of this litigation. Briefly, the lease provided a certain monthly payment to Green that could be reduced should Green terminate his employment with Advance Ross or should he be terminated for cause. A new written employment contract was also executed. In 1978 Advance Ross terminated Green's employment

and reduced the lease payments. Green then filed two lawsuits against Advance Ross. In the instant Texas action, Green sued as trustee for violation of the lease agreement. In the other, the Illinois action, Green sued (in his individual capacity) Advance Ross and Harve Ferril, an individual, for a preliminary injunction, severance pay, and punitive damages, all based on the employment contract. The Illinois action was filed six days prior to the Texas action.

Advance Ross, represented by Texas counsel, made a plea in abatement in the Texas action, requesting the trial court to stay its hand until the Illinois action was decided. The plea was overruled and a jury trial on the merits found in favor of Green. Advance Ross then appealed to the Tyler Court of Appeals asserting a variety of trial errors. The Court of Appeals unanimously rejected all of them. It specifically refused to overturn the trial judge's ruling on the plea in abatement. It held it could not determine whether the trial judge erred because there was no showing in the record what evidence had been adduced at the hearing on the plea. In Texas "the propriety of a court's order overruling a plea in abatement depends upon the evidence adduced at the hearing on the plea." (App. at A-6). The Court of Appeals cited three Texas cases, one from 1936 and two from 1980, as authority. Advance Ross then sought a writ of error to the Texas Supreme Court, again relying on a variety of alleged state law errors. The writ of error was denied.

In neither the brief on the merits to the Court of Appeals nor the Application for Writ of Error to the Supreme Court did Advance Ross assert a federal question or, for that matter, even cite a federal case. The federal questions entered the litigation only after the Texas judgment became final.

The Illinois action, now well over three years old, has yet to be set for trial.

REASONS FOR DENYING THE WRIT

I. The Federal Questions Presented Are Raised for the First Time in the Petition for Certiorari and Have Never Been Presented to the Texas Courts.

Conspicuously absent from the petition is a section complying with Rule 21(h) stating how the federal questions were raised in the state trial and appellate courts. The reason for this omission is that the federal questions were created only after the Texas Supreme Court ruled that there had been no reversible error in the judgment of the Court of Appeals and, accordingly, denied review.

In petitioner's application to the Texas Supreme Court for a Writ of Error there were seven different errors assigned. Not a single one involved a federal question. The List of Authorities in the application cited eight different Texas cases. The same holds true for the petitioner's brief on the merits in the Court of Appeals. Eight points of error by the trial judge were asserted, but each rested on state law. Again, only Texas decisions were cited as authority. There simply was no assertion of any federal question to the Texas courts.

II. The Questions Presented Neither Are Important Nationally Nor Is the Decision Below Out of Harmony with Decisions of This or Other Courts.

A. *The Deference Issue*

The main thrust of petitioner's argument is that the filing of the Illinois action by itself was sufficient to implicate either the Full Faith and Credit Clause or the Due Process Clause to prohibit any court from proceeding on any related claim until the Illinois courts were through with the case. While it is perfectly true that an Illinois judgment would be entitled to full faith and credit, it is not the law that mere filing of an action in one state precludes sister states from proceeding to try a related action.

The bulk of the cases cited by petitioner are cases arising in federal courts where this Court's supervisory powers are at their greatest. Yet even on a supervisory basis they do not support petitioner's claim. As this Court stated in the latest of the cases, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976): "Generally, as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . .'" The one case petitioner relies on that does arise from a state court, *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943), is based on the Full Faith and Credit Clause. But there, unlike the situation here, the Louisiana courts declined to give any effect to a Texas judgment based on an identical claim to the one pursued in Louisiana. It is a far cry from the *Magnolia Petroleum* result of holding that Louisiana must give full faith and credit to an existing Texas judgment to the result petitioner seeks requiring Texas to give a res judicata effect to a lawsuit which has never been tried.

Not only is petitioner's claim without authoritative support, but in addition, the result urged makes no sense. If we were a Nation with a wholly unified legal system petitioner's desired result might make considerable sense. The first case filed is first in right is a simple rule to apply and it has a certain efficiency claim. But the United States is a Nation of 51 separate legal systems. Petitioner's result would force all the state judiciaries, from the most efficient to the least efficient, into a single mold. Furthermore, the facts of the instant case belie the strongest part of petitioner's claim: that it is efficient. The Texas and Illinois actions were filed six days apart in February 1979. The Texas action is complete. A jury trial was held; a judgment on the merits was entered; an appellate court has written an opinion on the case; a further appellate court has found no reversible error in the proceedings. Were it not for the petition for

certiorari the judgment could be executed. The Illinois action, filed in Chicago, has yet to be set for a trial date. Petitioner's claim of efficiency and judicial economy is that it is better for an action to sit idly by for years than to be fully litigated in the same time. That logic is not entirely compelling.

B. *The Appellate Review Issue*

Petitioner's due process claim is no stronger than the full faith and credit argument. No where is this better illustrated than in petitioner's citation of *Powell v. Alabama*, 287 U.S. 45 (1932) and *Lassiter v. Dep't of Social Service*, 452 U.S. 18 (1981). The courts below did not condemn young indigent southern blacks to death without even the aid of counsel as in *Powell*. Nor did Texas terminate parental rights of an indigent mother without the aid of counsel as in *Lassiter*. What Texas did do was apply a 45 year-old procedural rule to an issue collateral to the merits of the litigation to a party represented by local counsel in circumstances of non-compliance with the rule.

The Court of Appeals created no new Texas law when it held that the propriety of an appellate court overturning a trial court ruling on a plea in abatement depends on the facts adduced at the hearing on the plea. In *Geyer v. Jones*, 93 S.W.2d 1192 (Tex. Civ. App.—San Antonio 1936, writ dism'd) the court stated that "the ruling of the trial judge in the matter is binding upon this court, in the absence of a statement of the facts adduced at the hearing." 93 S.W.2d at 1194. The court below not only relied on *Geyer*, but also on two 1980 decisions to the same effect. The rule is long-standing, clear, and fair.

In these circumstances the decision to apply the settled procedural rule to an issue wholly collateral to the merits of the case is hardly arbitrary. Furthermore, if for some reason the rule of *Geyer* has outlived its pur-

poses--a dubious assumption—and now violates an evolving standard of due process, then the least that is expected of a litigant is to give fair notice to the state court that its rule has become archaic and unconstitutional. Even if one could make a further assumption that petitioner had no obligation to anticipate application of the *Geyer* rule prior to the decision of the Court of Appeals, the fact remains that the "arbitrary refusal" that violates "fundamental fairness" (petn. at 13) was never brought to the attention of the Texas Supreme Court by any reference to the Constitution. Not only would it be a bold step to find that a procedural rule that provides for the orderly consideration of collateral issues violates the Due Process Clause; to do so would also necessitate ignoring the fact that failure to present the issue to the Texas courts results in the decision resting on an adequate and independent state law ground.

CONCLUSION

The petitioner has presented federal questions to this Court that are introduced in the litigation for the first time. Were that not sufficient for denying the writ, the questions are patently unworthy of plenary review by this Court. For these reasons the writ of certiorari should be denied.

Respectfully submitted,

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